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IN THE

Supreme Court of the United States

October Term, 1962

No. .....

RAMON NOVARRO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to Granting Writ of Certiorari.

Statement of the Case.

Petitioner was convicted in the Municipal Court of Los Angeles Judicial District, State of California, of violation of Section 23102 of the California Vehicle Code, driving while under the influence of intoxicating liquor. Petitioner attempted to appeal from the judgment of conviction but failed to file his Notice of Appeal within the jurisdictional time allowed.

Petitioner then sought a writ of habeas corpus in the California Supreme Court which was denied without opinion by said Court on October 10, 1962:

> "Crim. 7216—In re Novarro on Habeas Corpus. Petition for Writ of Habeas Corpus denied." (58 A. C. No. 16, p. 2 of Minutes.)

Petitioner now seeks certiorari in this honorable court on the grounds that he was denied the due process and equal protection afforded by the 14th Amendment.

I.

The Supreme Court of the United States Should Not Grant Certiorari Where Petitioner Has Not Exhausted His State Remedy of Appeal.

California follows the federal rule as set forth in *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 469, that habeas corpus cannot serve as a substitute for an appeal, and, in absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.

In re Connor, 16 Cal. 2d 701, 705, 108 P. 2d 10;

In re McInturff, 37 Cal. 2d 876, 880, 236 P. 2d 574;

In re Dixon, 41 Cal. 2d 756, 759, 264 P. 2d 513.

Rule 2, Rules on Appeal from Municipal Courts and Justice Courts in Criminal Cases, 56 Cal. 2d 10 (App. A) requires that a written notice of appeal be filed in the court where the judgment or order appealed from is rendered within ten days after the rendition of such judgment or order. In California the rule is well settled that the time requirements for the taking of an appeal are mandatory and the appellate courts are without jurisdiction to consider an appeal which has been

taken subsequent to the expiration of the statutory period.

People v. Spencer, 193 Cal. App. 2d 13, 16, 13 Cal. Rptr. 881;

People v. Slobodion, 30 Cal. 2d 362, 365, 181 P. 2d 868;

People v. Lewis, 219 Cal. 410, 413, 27 P. 2d 73.

Petitioner admits that the remedy of a timely appeal from the judgment of conviction of the trial court was available to him, and that he, though represented by counsel, failed utterly to take the necessary steps to perfect such appeal.

II.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

As the record certified to this Court reveals, the California Supreme Court denied the petition for habeas corpus on October 10, 1962, and no opinion was delivered by said court.

It is not sufficient to give the United States Supreme Court jurisdiction that a federal question might have been raised or might have been decided and was involved in the case; it must appear, either in direct terms or by necessary intendment; that it was in fact brought to the notice of the court and decided by it.

Bolling v. Lersner, 91 U. S. 594, 23 L. Ed. 366;

McQuade v. Trenton, 172 U. S. 636, 43 L. Ed. 581;

Wilson v. Cook, 327 U. S. 474, 90 L. Ed. 793.

In *Stembridge v. State of Georgia,* 343 U. S. 541, 96 L. Ed. 1130, it was held that, where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, the United States Supreme Court will not take jurisdiction to review the judgment.

Thus it is obvious that because the petitioner failed to take a timely appeal, the decision of the California Supreme Court denying habeas corpus without opinion could have rested upon adequate state grounds, and therefore, this honorable court under the rule of *Stembridge v. Georgia, supra,* should decline to take jurisdiction of this matter.

III.

In That the State Statute Involves a Question of Local Pleading and Practice, and Such Question Has Been Adjudicated by the State Courts, and Enforcement of the State Statute as Interpreted by the State Courts Does Not Result in a Denial of Due Process, No Federal Question of Substance Is Here Presented.

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness is essential to the very concept of justice, but due process of law is satisfied when one, present in court, is convicted of crime after having been fairly advised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166;

Frisbie v. Collins, 342 U. S. 519, 96 L. Ed. 541.

Section 40306, California Vehicle Code, the statute in question, provides:

> "(a) Whenever a person is arrested for a misdemeanor and is taken before a magistrate, the arresting officer shall file with the magistrate a complaint stating the offense with which the person is charged.
>
> (b) The person taken before a magistrate shall be entitled to at least five days continuance of his case in which to plead and prepare for trial and the person shall not be required to plead or be tried within the five days unless he waives such time in writing or in open court.
>
> (c) The person taken before a magistrate shall thereupon be released from custody upon his own recognizance or upon such bail as the magistrate may fix." [Statutes 1951, Chap. 3, p. 1776.]

On August 31, 1962, the Appellate Department of the Superior Court for the County of Los Angeles, in *People v. Maggiora*, CR. A. 5111 (App. B), decided the very point presented by petitioner. It was there held that the arresting officer under Section 40306, California Vehicle Code, was required to file, not to sign, the complaint only when such person was actually taken before the magistrate but that when a magistrate was not available, the arresting officer need not comply with the section but may rather, follow the procedure set forth in Section 40307, California Vehicle Code, which provides:

> "(a) When an arresting officer attempts to take a person arrested for a misdemeanor viola-

> tion of this code before a magistrate and the magistrate or person authorized to act for him is not available, the arresting officer shall take the person arrested before the clerk of the magistrate or the officer in charge of the most accessible county jail, city jail, or other place of detention within the county, who shall admit him to bail in accordance with a schedule, fixed as provided in Section 1269(b) of the Penal Code." [Statutes 1959, Chap. 3, p. 1776.]

The court also held that, assuming for the sake of argument the arresting officer was wrong in not signing or filing the complaint,

> "it does not follow that the complaint should be dismissed. The section is not a constitutional requirement nor is it substantive, but only statutory and procedural. There has been no showing of prejudice." (*People v. Maggiora, supra.*)

Thus, the California courts have held that petitioner's interpretation of the statute involved is incorrect, that is, it must be shown that a magistrate was available at the time of arrest and, if available, that petitioner was actually taken before a magistrate.

It is the peculiar province and privilege of the state courts to construe their own statutes. The power delegated to the United States Supreme Court is for restraint of unconstitutional legislation by the states and not for the correction of alleged errors committed by their judiciary.

Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487;

McNulty v. California, 149 U. S. 645, 37 L. Ed. 882.

Because of petitioner's failure to perfect an appeal, there is presently no record of the proceedings pertaining to the arrest, release on bail and subsequent trial of petitioner now before this court other than the unsubstantiated statements of John N. Frolich, counsel for petitioner. Assuming, however, for argument, that such unilateral representations are correct, respondent submits that petitioner's own accusations do nothing more than present this Honorable Court with a non-federal question. Petitioner concedes that a complaint was in fact filed by one J. W. Fletcher of the Los Angeles Police Department and that such complaint was verified upon the information and belief of said J. W. Fletcher. Petitioner also sets out the provisions of Section 740 of the California Penal Code (App. C), which requires that all public offenses triable in the inferior courts be prosecuted by written complaint under oath, subscribed by the complaining party, but that such verification may be upon information and belief. The obvious purpose and necessity of this section is to insure that one accused of crime will be fully and fairly put on notice of the charge against him and that such charge is laid against him by a person who is conversant with the facts of the crime or arrest, or who is in a position to represent that he has information and belief of the existence of such facts and who will stand responsible to the accused and to the courts if they prove to be non-existent.

Petitioner nowhere alleges, and respondent submits, that he is not in a position to allege that he was not sufficiently apprized of the charge against him or that his subsequent release on bail deprived him of some

right, or that his subsequent trial was short of being full and fair or resulted in prejudice to him in any way.

It has repeatedly been held, both in the California courts and the federal courts, that no accusatory pleading is insufficient or judgment reversible by reason of any defect or error as to any matter of pleading or procedure where such defect or error does not prejudice a substantial right of the defendant.

California Penal Code Section 960 (App. D); California Constitution, Article VI, Sec. 4½ (App. E).

A defective accusatory pleading, even one that is so defective that a demurrer should have been sustained thereto, will not result in a reversal of conviction unless a substantial right of the defendant, on the merits, is adversely affected.

People v. Schoeller, 96 Cal. App. 2d 61, 214 P. 2d 565;

People v. Beesly, 119 Cal. App. 82, 6 P. 2d 114;

People v. Mitchell, 40 Cal. App. 2d 204, 104 P. 2d 545.

The federal courts hold forth the propositions that the question of whether or not the state constitution was complied with in the proceedings on a criminal trial is not a federal question,

Baldwin v. Kansas, 129 U. S. 52, 32 L. Ed. 640;

Brooks v. Missouri, 124 U. S. 394, 31 L. Ed. 454.

and a ruling of a state court involving nothing more than a decision of a question of local pleading and practice is not open to review in the Federal Supreme Court.

Washington v. Miller, 235 U. S. 422, 59 L. ed. 295.

Conclusion.

It is urged that the petition for writ of certiorari to the Supreme Court of California be denied.

Respectfully submitted,

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Deputy City Attorney,

Attorneys for Respondent.

APPENDIX A.

Adopted by the Judicial Council of the State of California. Effective September 15, 1961. (Rule 2 of Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases)

Appeal—How Taken. An appeal to the Superior Court of the county in which such inferior court is located is taken by filing written notice of appeal in the court wherein the judgment or order appealed from is rendered, within ten days after the rendition of such judgment or order, except that an appeal from an order denying a motion for a new trial in cases where the defendant is committed before final judgment for sexual psychopathy, insanity, or narcotics addiction may be taken within ten days after the making of such order or the defendant's commitment, whichever is later. Such written notice of appeal shall be filed with the clerk of said court, or, if there be no clerk, with the magistrate therein presiding. The date of such filing shall be the effective date of the taking of such appeal. If such notice of appeal is not filed as aforesaid within the time required, such appeal shall be void and of no effect.

APPENDIX B.

People v. Irene Ariadne Maggiora, CR A 5111.
August 31, 1962

Appeal by People from order dismissing the complaint of the Municipal Court of the South Gate Judicial District, F. W. Bunnett, Judge. Reversed with directions.

City Attorney's Summary of Material Facts Before the Court in the Statement on Appeal.

The pertinent facts in this case are contained in the court's Opinion and Judgment.

OPINION AND JUDGMENT
(Prepared by Court)

This is an appeal by the People. There is no dispute regarding the facts. The trial court dismissed the complaint for the sole reason that the complaint was not signed and filed by the arresting officer but by the assistant chief of police of South Gate.

The complaint charged a violation of Sec. 23102a-V.C. (driving while under the influence of intoxicating liquor). Sec. 40302 V.C. provides that for this offense the defendant shall be taken before a magistrate and Sec. 40306a V.C. provides: "Whenever a person is arrested for a misdemeanor and is taken before a magistrate, the arresting officer shall file with the magistrate a complaint. . . ." Because of this section, and the failure of the arresting officer to sign the complaint, the trial judge dismissed the complaint.

This was error for several reasons.

First: In this case a magistrate (the arrest having been made about 2:35 A.M.) was not available but, pursuant to Sec. 40307 V.C., the defendant was released on bail. Thus literally Sec. 40306 V.C. relied on by defendant-respondent, was inapplicable since it applies only when defendant is taken before a magistrate. While this is a technical answer, so is the claim asserted by defendant-respondent.

Second: V.C. Sec. 40306 requires the arresting officer to *file* the complaint but does not require him to *sign* it. The obvious purpose of the section is to place upon the arresting officer the primary responsibility to see that a complaint is filed. Compare *People v. Biffle* (1950) our CR A 2596 where a somewhat comparable provision in H. & S. Code Sec. 26604 was construed not as an exclusive mode but "to impose on someone in authority the burden of attending to such criminal actions, or prosecutions." We hold that the arresting officer may file the complaint personally or he may activate the machinery which causes the complaint to be filed. It is an old maxim of jurisprudence that "Qui facit per alium facit per se." In either case the purpose of the section has been accomplished when the complaint is filed. In the case at bar the complaint was filed the day of the defendant's arrest and it complies with Penal Code Sec. 740as to its contents.

Third: However, assuming, without deciding, that the arresting officer was wrong in not signing or filing a complaint, it does not follow that the complaint should be dismissed. The section is not a constitutional requirement nor is it substantive, but only statutory and procedural. There has been no showing of prejudice.

The same legislative body that created the requirement may, and has, stated the consequences of failing to follow it. Sec. 960 P.C. provides that "no accusatory pleading is insufficient" because of a defect in form absent "prejudice". The legislature has also told appellate courts in Sec. 1258 P.C. that we must disregard "technical errors or defects". The principle announced in *People v. Washington* (1962), 204 A.C.A. 234, applies here. At P. 237 the court said: "Moreover, failure to impose sentence within the time specified by Section 1191 of the Penal Code is clearly an error of procedure and under California Constitution Article VI, Section 4½, the judgment may not be reversed unless the error complained of has resulted in a miscarriage of justice. (*People v. Zuvela,* 191 Cal. 223 . . .; *People v. Williams,* 24 Cal. 2d 848 . . .)"

Fourth: Before closing this memorandum we should make reference to Sec. 40300 V.C., although not urged by the respondent in this case. That section (which has been strongly relied upon by defendants in other cases) reads as follows: "The provisions of this chapter shall govern all peace officers in making arrests for violations of this code without a warrant for offenses committed in their presence, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade."

It may well be that the words "shall not otherwise be exclusive" imply that to the extent stated in the first part of the sentence the procedure of the Vehicle Code is exclusive. Such first part however relates only to "arrests" and not to subsequent procedures. We

should not assume that the reference to "arrests" alone in the first part was inadvertent because the Legislature in the latter part of the same sentence referred to both "arrest and prosecution" and hence at the moment of enactment was mindful of the difference. Furthermore there is no reason to give a strained construction to Sec. 40300 V.C. in order to reach a technical result which is not meritorious. Thus if there is an implication that the procedure is exclusive, it is exclusive only as to the arrest and not to anything subsequent thereto.

The judgment of dismissal is reversed with directions to try the case.

By the Court
SWAIN, Presiding Judge
SMITH, Judge

APPENDIX C.

Added by Stats. 1951, c. 1674, p. 3831 (Penal Code Section 740)

[Public offenses triable in inferior courts: Prosecution by written complaint under oath: Verification on information and belief.] Except as otherwise provided by law, all public offenses triable in the inferior courts must be prosecuted by written complaint under oath and subscribed by the complaint. Such complaint may be verified on information and belief.

APPENDIX D.

Amended by Stats. 1951, c. 1674, p. 3838 (Penal Code Section 960)

[Same: Defects or imperfections in matter of form not prejudicial to substantial right of defendant.] No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.

APPENDIX E.

Added Oct. 10, 1911; amended Nov. 3, 1914 (California Constitution, Article VI, Sec. 4½)

Reversal for error resulting in miscarriage of justice. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.